



**DEPARTMENT OF THE ARMY**  
**HEADQUARTERS UNITED STATES ARMY FORCES COMMAND**  
**1777 HARDEE AVENUE SW**  
**FORT MCPHERSON GEORGIA 30330-1062**

REPLY TO  
ATTENTION OF

AFLG-PR

5 September 1997

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Contracting Information Letter (CIL) 97-42

1. This CIL contains information on the following subjects:

- a. GAO Decision on Past Performance Evaluation,
- b. Contract Cost/Schedule Status and Control,
- c. ASBCA Case List and Writing Better Final Decisions,
- d. Fair and Reasonable Prices; Bargaining in the Market Place,
- e. Major Provisions of the 1996 Freedom of Information Act (FOIA) Amendments,
- f. Processing of Proposed Waivers to Regulatory and Legal Barriers,
- g. Management for Contracting Supervisors Course (CON 333), and
- h. Architect-Engineer (A&E) Name, Address, and Phone Number on Drawings and Specifications.

2. GAO Decision on Past Performance Evaluation.

a. Reference GAO Decision B-276472 dated 23 June 1997 (encl 1).

b. In a recent GAO protest decision, the GSA lost a case because it failed to offer the protestor the required opportunity to comment upon the agency's collection of adverse Past Performance Information (PPI). This case is representative of a growing pattern of Past Performance cases that the government is losing for the simple failure to take the time to hold adequate discussions on adverse

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PPI. This decision should be reviewed by all contracting personnel. The decision may also be found on the internet at <http://www.gao.gov/decisions/bidpro/276472.htm>. For additional information, please contact Ms. Joan Sylvester at DSN 367-6237.

3. Contract Cost/Schedule Status and Control.

a. The continued implementation of such initiatives as Regionalization and Commercial Activities contracting is expected to result in an increase in complex, high-dollar, high-visibility contracts. We must be prepared to address and give an account of all aspects of the contractor's costs and performance throughout the life of the contract. The attached Contracting Division memo, AFLG-PRO, 26 August 1997, SAB (encl 2), contains recommendations and guidelines for establishing a methodology of accounting for contract cost and performance. Directorates of Contracting that have systems already in place are encouraged to share them with the FORSCOM contracting community.

b. For additional information, please contact Ms. Joan Sylvester at DSN 367-6237.

4. ASABCA Case List and Writing Better Final Decisions.

a. We received general information and statistics from the Army Chief Trial Attorney, JALS-CA, dated 6 June 1997, SAB (encl 3), on the status, trends and areas of concern pertaining to Army contract dispute cases at the Armed Services Board of Contract Appeals (ASBCA). The Army-wide statistics show a decrease in new cases and an increase in the number of large dollar appeals -- those greater than \$1,000,000.

b. One area of major concern is the lack of attention to detail in final decisions; i.e., errors in the mandatory appeal rights language with the decision failing to note the increased limits for expedited and accelerated appeals. We provide "Practice Tips for our Partners in Litigation," (encl 4) for guidance and assistance in preventing contract

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disputes litigation and how to cast the government in the best light possible from the outset.

c. The statistics for FORSCOM show that only one FORSCOM appeal case exceeded \$1,000,000. The remaining appeal cases are small dollar, ranging from \$600 to \$700,000. Only one percent of all claims, appellant and government, resulted in the award of dollars. FORSCOM appellant claims total \$1,245,516 with only \$239,524 awarded to appellants; and government claims total \$56,860 with \$500 awarded to the government (encl 5). More than half of the cases were dismissed and less than half of the cases was settled, while one case was sustained and two denied.

d. We did not conduct an in-depth analysis of the FORSCOM statistics of appeal cases whose dollar value was less than \$1,000,000. Therefore, we were not able to determine the contributing factors for the stated trends. However, when you consider only the FORSCOM statistics (small dollar claims and small percentage of dollars awarded), it appears that a significant portion of these appeals may have been prevented or even settled. We encourage contracting officers to take appropriate action to prevent contract disputes litigation to include applying aggressive contract administration procedures, using alternate dispute resolution procedures, and incorporating "Practice Tips" as you write final decisions.

e. Contact Julie Grace, DSN 367-5690 for additional information.

5. Fair and Reasonable Prices; Bargaining in the Market Place. Reference memo, SARD-PP, dtd 1 August 1997, SAB (encl 6). This memo deals with concerns about our practices regarding Federal Supply Schedule contracts and contracts for commercial items with catalog pricing.

6. Major Provisions of the 1996 Freedom of Information Act (FOIA) Amendments. The National Defense Authorization Act for Fiscal Year 1997 created a statute that permits a new FOIA exemption status:

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a. Armed Services Acquisition: Section 2305 of title 10, USC is amended by adding the following paragraph (g) new subsection:

"(g) PROHIBITION ON RELEASE OF CONTRACTOR PROPOSALS:

(1) Except as provided in paragraph (2), a proposal in the possession or control of the Department of Defense may not be made available to any person under Section 552 of Title 5.

(2) Paragraph (1) does not apply to any proposal that is set forth or incorporated by reference in a contract entered into between the Department of Defense and the contractor that submitted the proposal.

(3) In this subsection, the term "proposal" means any proposal including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal.

(4) This means that proposals not selected for award are exempt from release. Denial of requests for this information is based on Exemption 3, disclosure prohibited based on statute, which permits no discretion in the release of proposals. Proposals selected for award are still exempt from release under FOIA Exemption 4."

b. Major provisions of 1996 FOIA Amendments: The amendments recognize that records are no longer principally maintained in paper format. Now they are maintained in a variety of technologies including CD ROM, computer tapes, and diskettes. In accordance with the 1996 amendment to the FOIA Act, FOIA requests will be processed using hard copy and/or electronic release. Changes made by the amendment include extending the suspense for replying to a request from 10 to 20 working days, changing the annual report date from the end of the calendar year to the end of the FY, and establishes a requirement for an index of selected FOIA disclosed records.

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c. Records in Electronic Format and their Release:

(1) Contracting offices shall make reasonable efforts to search for records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated info system.

("Search" means to review, manually or by automated means, agency records for the purpose of locating those records that are responsive to a request.) Further, contracting offices shall provide requested information in any form or format requested if the record is readily producible in the requested format. For records created on or after 1 November 1996, within one year after such date, each agency shall make such records available. Deleting information that would harm an interest protected by the exemptions is still required. However, in each case the justification for deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record that is made available or published, unless including that indication would harm an interest protected by an exemption. If feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made.

(2) Suspense: The ten day suspense the government has to acknowledge the FOIA request is changed from 10 to 20 work days. Congress recognized that with today's limited resources, it is frequently difficult to respond to a FOIA request within the ten days formerly required in the law.

(3) Annual Report: The next Annual FOIA Report, DD Form 2564, is due 15 Sep 97 and will cover the period Jan - Sep 97. Subsequent annual reports will be provided 15 Sep of each year and will cover the period Oct - Sep. The amendment changed the annual FOIA report date from calendar year to fiscal year.

(4) An index of selected FOIA disclosed documents will be available via Internet NLT 1 Nov 97. Indexing of records will take place through 31 Dec 99 which is the date of completing the electronic index. After this office

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identifies those released FOIA documents of subsequent requests, you may begin to formulate the index and identify information for the public as to any matter issued, adopted, or promulgated.

d. For additional information, please contact Ms. Julie Grace at DSN 367-5890.

7. Processing of Proposed Waivers to Regulatory and Legal Barriers. Reference memo, AFRM, dtd 4 August 1997, SAB (encl 7). This memo provides guidance on the revised methods for processing waivers to regulatory or legal barriers to achieve greater efficiency in FORSCOM operations.

8. Management for Contracting Supervisors Course (CON 333). The Defense Acquisition University now considers the former Executive Pre-Award Contracting course (CON 311) and Executive Contract Administration course (CON 321) to be predecessor courses for CON 333. This means that if an individual has successfully completed CON 311 and/or CON 321, they will not be allowed to attend CON 333. For additional information, please contact Clyde Thomas at DSN 367-6372.

9. Architect-Engineer (A&E) Name, Address, and Phone Number on Drawings and Specifications.

a. Reference CIL 93-36, paragraph 3.

b. The requirement to delete the above information from A&E Drawings and Specifications prior to issuance of the solicitation is no longer valid. The general public may obtain this information from a listing that is published by the State Board of Registration for Professional Engineers and Land Surveyors Roster with the A&E seal that is on the

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drawings. It is also very time consuming for the DPW.

c. For additional information, please contact Sandi Bruner at DSN 367-6296.



7 Encls  
as

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### DIGEST

1. Protest challenging evaluation of awardee's proposal as technically superior to protester's proposal under factor for past performance of similar projects, based on greater relevance of awardee's projects, is denied where record shows awardee's experience was reasonably determined to include projects more directly comparable to the proposed project.
2. Protest that agency violated Federal Acquisition Regulation § 15.610(c)(6) by not advising protester of adverse past performance reference is sustained as the regulation clearly requires such discussions where, as here, the protester has not otherwise had an opportunity to reply to the information and the record shows a reasonable possibility of prejudice.

### DECISION

McHugh/Calumet, a Joint Venture (McHugh) protests the award of a contract to Huber, Hunt & Nichols, Inc. (HHN) under request for proposals (RFP) No. GS-05P-GBC-0015, issued by the General Services Administration (GSA) for construction of a new federal courthouse in Hammond, Indiana. The protester argues that the agency improperly evaluated proposals and failed to conduct adequate discussions.

We sustain the protest.

### BACKGROUND

The RFP contemplated award of a fixed-price contract for the construction of a 270,000-square-foot, four-story, limestone-clad courthouse housing seven courtrooms, federal office space, a cafeteria, and a firing range. The solicitation provided for award to the offeror whose proposal provided the greatest value to the government, with price equal to technical factors. The technical factors, in descending order of importance were as follows: (1) quality control plan (40 percent), (2) past performance on similar projects (35 percent) and (3) key personnel qualifications (25 percent).

Four proposals were received by the closing time, three of which--including HHN's and McHugh's, the only ones relevant here--remained in the competitive range until the source selection. The agency conducted three rounds of discussions and afforded offerors opportunities to submit revised offers and two rounds of best and final offers (BAFO).

Although the cost of McHugh's final BAFO (\$49,237,200) was lower than HHN's (\$50,263,000), HHN's BAFO received a consensus technical score of 78.3, which was 1.2 points higher than the score of 77.1 received by McHugh's BAFO. While McHugh's technical proposal received slightly higher consensus scores for quality control (32.25 versus 32), which was the most important factor, and key personnel (19.2 versus 18.3), the least important factor, HHN's proposal received a somewhat higher score for past performance (28 versus 25.56), the second most important factor. According to the agency, the evaluated difference with respect to past performance was "the major difference" between the offerors. Specifically, the SSEB concluded that HHN's past performance (1) was more relevant to the proposed project than McHugh's, and (2) showed that the firm is more willing to work as a part of a team in order to keep costs down, the project on schedule, and the building tenants happy. The SSEB determined that the advantages of HHN's technical proposal were worth the associated \$1,026,000 price premium, and that HHN's BAFO offered the greatest value to the government. Upon learning of the resulting award to HHN, McHugh filed this protest.

McHugh challenges the agency's evaluation of, and conduct of discussions with respect to, past performance on similar projects. We find that the evaluation was unobjectionable, but that GSA improperly failed to discuss past performance information with McHugh.



## PAST PERFORMANCE ON SIMILAR PROJECTS

The solicitation generally provided for evaluation of past performance based on "the number and complexity of comparable projects associated with the Offeror's key personnel, previous client assessments of Offeror's performance, and the Offeror's team experience in working together on previous projects." The RFP specified the following "primary considerations": (1) completion on time and within budget; (2) commitment in terms of quality, time and cost; (3) working relationship with owner, including problem resolution and change order execution; (4) working relationship with architect/engineer; (5) scope of services; (6) success in meeting owner's needs and expectations; (7) Occupational Safety and Health Administration record; and (8) references.

Proposals were required to include a one-page description and references for each of two sample projects, completed within the last 5 years, with "similar scope, requirements, and/or complexity" to the project contemplated by the RFP. In addition, GSA reserved the right to consider projects other than the two sample projects. In this regard, the RFP requested offerors to provide summary descriptions, including references, for five completed projects, five current projects, and five of the largest projects for which the offeror was responsible over the past 5 years. Further, the RFP specifically provided that in addition to the references provided by offerors, the agency might inquire about an offeror's projects not referenced in the proposal if it had first-hand knowledge of those projects. While the agency found McHugh's past and current projects to be "similar in size and budget" and generally "comparable" to the proposed project, it found them to be not "specifically" or "directly" comparable to the proposed project "in complexity or function," and determined that HHN's past and current projects were "significantly more similar" than McHugh's. For example, while McHugh had not completed or worked on any courthouse projects within the past 5 years, HHN had three current courthouse projects, on one of which it was the general contractor, and on the other two was the construction manager. Likewise, GSA determined that HHN had superior experience with respect to the complexity of the architectural finish of its projects. In this area, the agency concluded that the interior work on HHN's construction contract for the renovation of the Civic Courthouse in San Francisco, California, consisting of a cherry veneer casework paneling system, was "directly comparable" to the interior woodwork of the proposed project, and was more similar to that interior than the architectural finish on any project submitted by McHugh. GSA further concluded that the architectural finishes on one of HHN's sample projects, the San Francisco Library, designed by the same architect who designed the Hammond courthouse, were "very similar to the proposed finishes and details" of the proposed project and demonstrated the firm's "ability to construct the intricate details and finishes" typical of a design by this architect. Additionally, the agency viewed the exterior finish on HHN's second sample project, the Indiana Government Center, as directly comparable to the proposed project, since both have limestone facades. In contrast, the agency considered the complexity of finishes on McHugh's projects as only "similar," and not directly comparable, to the proposed project. For example, the agency viewed the finishes on one of McHugh's sample projects, the Chicago Place Condominium, as only "approach[ing] the level of finishes" for the proposed project.

McHugh maintains that it possesses greater relevant construction experience than HHN on projects similar in size and complexity to the contemplated project. In this regard, according to McHugh, it possesses extensive experience working as a general contractor, which experience, it claims, should have been viewed as more relevant than HHN's experience, which McHugh characterizes as that of a construction manager rather than a general contractor.

In considering a protest against an agency's evaluation of proposals, we will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations.

The evaluation in this area was reasonable. As noted by the protester, GSA initially concluded that HHN had more construction management experience than general contractor experience, and evaluated this as a weakness. However, based on HHN's explanation during discussions of the extent of its role and responsibilities when acting as a construction manager, and the benefits of its construction management experience, the agency determined that HHN's experience acting as both a general contractor and

construction manager was a strength. In this regard, the agency concluded that HHN's construction management experience "enhances their role as a third party problem resolver" and "makes them more sensitive in fostering good working relationships with the architect and construction manager." We find nothing unreasonable in the agency's position that HHN's construction management experience would enhance its ability to maintain working relationships and solve problems, considerations that were specifically recognized as primary considerations under the past performance factor. Moreover, the record indicates that HHN did in fact possess significant general contractor construction experience; the firm was the general contractor on both of its sample projects, as well as for the San Francisco Civic Center Courthouse. Given also that the scope of services provided was only one of eight primary considerations under the past performance area and, moreover, that the focus of the past performance evaluation generally was the "number and complexity of comparable projects," not the amount of general contractor experience, this aspect of the evaluation is unobjectionable.

## DISCUSSIONS

HHN's overall advantage with respect to past performance was based not only on the greater similarity of its prior projects to the contemplated project, but also on its evaluated more consistent record of establishing a successful working relationship. Specifically, on two of the three projects for which GSA obtained a performance evaluation from the contacted references, HHN received above-average ratings for its working relationships with the owner and architect/construction manager and its commitment to problem resolution. HHN received an outstanding rating on a third contract, which it held with GSA; SSEB members familiar with HHN's performance under that contract reported that HHN displayed an "exceptionally cooperative" attitude and that there were very few change orders issued on the project and "no negative issues or conflicts with the project."

In contrast, while McHugh's references for two projects furnished above-average or outstanding ratings for working relationships and commitment to problem resolution, the GSA sources (including the SSEB chairman) contacted with respect to McHugh's performance on a GSA project for the renovation of a federal building at 536 South Clark Street in Chicago, Illinois reported a negative working relationship with McHugh and gave the firm generally below-average or poor ratings. Specifically, the SSEB chairman, who was the GSA project manager for the project, stated that there was "no indication [that McHugh] wished to help with delays or resolving problems" and concluded that the "project manager was the problem." On his evaluation worksheet under key personnel qualifications, he further indicated that McHugh's key person providing executive oversight (different from the firm's project manager) "was ineffectual on the 536 Clark project in regard to resolving problems and outstanding issues." Another past performance evaluation, completed after the filing of the protest by a GSA contractor serving in a project management function on the South Clark Street project, stated that the "[g]eneral attitude of McHugh's project management was adversarial and opportunistic," and that "McHugh's project management was adversarial and change-order oriented." In an addendum to the final SSEB evaluation report (prepared after the protest was filed, reportedly to document the source selection process), GSA reported that change orders for the South Clark Street project "appeared high," that "McHugh was less than timely and somewhat combative in addressing potential change order situations," and that "McHugh [had an] inadequate ability to deal with tenant and project team issues." As noted above, GSA generally concluded that McHugh's past performance indicated an unwillingness by the firm to work as a team to keep costs down, the project on schedule, and the building tenants happy. McHugh argues that the agency failed to hold meaningful discussions on past performance, because it did not advise the firm of the negative information received concerning its performance on the South Clark Street project. The protester contends that if discussions had been held, it could have improved its rating in this area by: (1) discussing the alternate personnel available to assign to the project; (2) furnishing additional information concerning its past performance history with respect to milestone maintenance and problem resolution; (3) explaining how a large portion of the changes on the South Clark Street project were related to asbestos conditions that were not covered by the contract and how a renovation project such as South Clark Street differed from the proposed new construction project; and (4) otherwise discussed "steps we have taken to remedy whatever problems the GSA perceived with respect to past performance." McHugh also notes that its project manager on South Clark Street is no longer employed by McHugh. In addition,

the protester asserts that GSA agreed to the changes and maintains that the project was completed on time.

Under Federal Acquisition Regulation (FAR) § 15.610(c)(6) (FAC 90-31), competitive range offerors shall be provided "an opportunity to discuss past performance information obtained from references on which the offeror had not had a previous opportunity to comment. . . ." GSA generally asked McHugh to address the increased costs under prior projects--including the South Clark Street project--where it had indicated a change in the scope of the project, and advised McHugh of its general concern that its "excessive emphasis on documentation usually is an indication of a contractor that is claim oriented." However, GSA did not bring to McHugh's attention, or provide McHugh an opportunity to address, the negative past performance references it had received bearing on the firm's working relationships and commitment to problem resolution on the South Clark Street project, notwithstanding that these negative reports were a significant factor in the source selection.

GSA contends that it was not required to raise this issue because FAR § 15.610(c)(6) is inapplicable to internal agency references. According to the agency, the FAR requires discussions only with respect to information obtained from third-party references, since third-party information is subject to interpretation, but does not require discussions concerning internal agency information, since such information is unlikely to be misinterpreted. In any case, argues the agency, it was not required to discuss McHugh's performance on the South Clark Street project because McHugh had a previous opportunity to comment on its performance during the course of that project, that is, because the problems on the project were "common knowledge" and "GSA expressed its dissatisfaction with McHugh's performance throughout the duration of the 536 South Clark Street project."

There is no basis to conclude that FAR § 15.610(c)(6) was inapplicable here. Nothing on the face of that FAR section (or elsewhere in the FAR) limits its application to third-party (i.e., outside the procuring agency) references; the clear language of the regulation conditions the requirement for discussions solely on whether the offeror has had an opportunity to address past performance information, and carves out no exceptions based on the source of such information. Neither do the statutory provisions concerning the past performance discussion requirement exempt agencies from the requirement for information generated by the agency itself. Indeed, 41 U.S.C. § 405(j)(1)(C)(i) (1994) appears to explicitly require discussion of such information. Under that provision, the Administrator for Federal Procurement Policy is to "prescribe for executive agencies guidance regarding consideration of the past contract performance of offerors in awarding contracts" that shall include policies for ensuring that "offerors are afforded an opportunity to submit relevant information on past contract performance, including performance under contracts entered into by the executive agency concerned. . . ."

We also do not agree that McHugh had a previous opportunity to comment on the negative information concerning its performance on the South Clark Street contract. McHugh acknowledges that it was aware of difficulties which arose relating to asbestos conditions not covered by the contract and which it believed had been successfully overcome, and that it became aware near the end of the project (when the protester believed it was too late to replace him without disrupting and delaying the project) of "personality conflicts" between the South Clark Street on-site project manager and GSA personnel. (As noted above, that project manager is no longer employed by McHugh.) However, the protester denies that it was notified by GSA of any problem with its overall organization regarding problem resolution, and GSA has furnished no documentary evidence that McHugh was ever notified of such a problem or that McHugh otherwise should have been aware of the problem, for example, through access to a database containing such historical performance information, or by some other such mechanism. We conclude that GSA was required to bring the negative South Clark Street project references to McHugh's attention during discussions and provide the firm an opportunity to address them.

GSA argues that, even if it failed to comply with FAR § 15.610(c)(6), McHugh was not prejudiced, and the protest should not be sustained on this basis, since the firm's suggested substitution of key personnel would not eliminate the perceived problem with the entire firm's overall negative attitude toward problem resolution.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. Based on our review of the record, which shows that because the competition was very close--with McHugh having submitted the lower cost offer and HHN enjoying only a 1.2-point scoring advantage--we cannot conclude that the protester would not have had a reasonable possibility of receiving the award but for the agency's failure to discuss references.

The record shows that the agency's concern about McHugh's ability to work as part of a team, including its commitment to problem resolution, played a critical role in the source selection decision. That concern was directly related to the unfavorable reports from the GSA references with respect to McHugh's performance on the South Clark Street project. In that context, the agency's assertion that no prejudice was caused by the failure to disclose the unfavorable reports during discussions is unpersuasive.

Disclosure of the agency's concern and discussions would have furnished McHugh the opportunity to contend, as it has here, that the past problems with the South Clark Street project were largely attributed to two key individuals and to attempt to persuade the agency that those problems should be viewed as less relevant to the evaluation of its current proposal. In light of McHugh's other references and the otherwise very close competition, we think that there was a reasonable possibility that disclosure during discussions of the negative past performance reference may have resulted in a different source selection. In this regard, we note that McHugh's proposed cost was low and its technical score was only 1.2 points below HHN's. We conclude that McHugh was prejudiced by the inadequate discussions, and sustain the protest.

We recommend that the agency reopen discussions, request another round of BAFOs, and reevaluate proposals. If, based on this reevaluation, McHugh's proposal is found to represent the best value to the government, the agency should terminate HHN's contract--performance of which has been suspended pending the outcome of this protest--and make award to McHugh. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1997). In accordance with section 21.8(f)(1) of our Regulations, McHugh's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General of the United States



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REPLY TO  
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26 Aug 97

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Contract Cost/Schedule Status and Control

1. Acquisition Reform and Reengineering initiatives continue to have a far-reaching effect on many of our contracting processes. The implementation of such programs as FORSCOM Regionalization and Commercial Activities contracting is expected to result in a significant increase in high-dollar, multi-year, multi-functional procurements, as well as an increase in cost-reimbursement type contracts.

2. Some of these contracts will have high visibility, and may be the subject of continuous scrutiny or inquiries from various interested parties in the private and public sectors. Each Directorate of Contracting should take proactive steps to ensure that you are capable of giving a current, accurate account of the contract status, and addressing all aspects of the contractor's costs and performance. It is also important to establish the capability to identify and explain significant variances in cost and performance schedules, both on a cumulative and a projected basis. This is needed especially for Commercial Activities contracts, where there will be considerable interest in verifying whether the contractor is truly achieving the savings indicated in the awarded proposal.

3. The method of accounting for and tracking contract cost/schedule performance may vary by installation and/or contract type - some of you may have already established a methodology. We recommend the following factors and considerations be incorporated into each tracking system:

a. Cost. Establish and maintain a time-phased (monthly, quarterly, etc.) break-out for (1) negotiated (estimated) costs; and (2) actual (invoiced) costs, over the life of the contract.

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The break-out may be by cost element (direct and indirect costs, subcontracts, etc.), function, task completion, and/or other measurement of performance/output. Explain any variation in the estimated and actual cost for any given time period, for each break-out category.

b. Delivery/performance schedule. Identify all contract deliverables, tasks, milestones, etc., that have a specific date for delivery or completion. Establish and maintain a table of (1) the initial, required delivery or completion date for each deliverable, task, milestone, etc., and (2) the actual delivery or completion date. Explain any variations in the required and actual delivery dates. Summarize action(s) taken, if applicable.

c. Contract workload. Establish and maintain a time-phased break-out for (1) estimated and (2) actual workload. This is applicable when the proposed/negotiated cost/price is based on a government or contractor estimated workload. The break-out should reflect all categories of workload data contained in the solicitation or contractor's proposal. Explain any variations in the estimated and actual workload for any given period.

d. Reports. Prepare a report on a regular, scheduled basis (e.g., quarterly) which integrates the three key areas discussed above, with a focus on cost and performance measurement. The reports should cover both the current and cumulative time period, and may also include projected data for the next time period. We suggest that the data be collected and reported in an electronic format, e.g., Excel or Powerpoint, to allow the creation and use of graphic presentations. Do not make retroactive changes to reports of a prior time period, except to correct typographical or calculation errors.

e. Contract revisions. Government-initiated or negotiated revisions in contract workload and/or performance requirements should be reflected in the period the revisions take effect, with an explanation of why the change(s) was made. The impact on cost and performance schedules for the current and succeeding periods should also be addressed.

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4. The method of accounting for and tracking the contract cost and performance should be included as an appendix to the contract administration plan. Performance measurements and results should be reviewed and accepted by the major participants in the contract, including the contracting officer, the contractor and the functional proponent. Information gathered and reported in the cost status/performance process will also serve as supporting documentation for the formal rating of contractor performance required by FAR 42.1502.

5. We request installations that already have a method for tracking, managing and/or controlling contract cost/schedules to forward them to us for sharing on the FORSCOM Contracting Home Page. For further information contact Ms. Joan Sylvester, DSN 367-6237, or Ms. Mary (Libby) Morris, DSN 367-6276.



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FT CARSON, ATTN: AFZC-DOC

JRTC & FT POLK, ATTN: AFZX-DOC

I CORPS & FT LEWIS, P.O. BOX 33931, ATTN: AFZH-DOC

3RD INF DIV (MECH) & FT STEWART, ATTN: AFZP-DC

101ST ABN DIV (AASLT) & FT CAMPBELL, ATTN: AFZB-DOC

DEVENS, ATTN: AFRC-FMD-DOC

FT DIX, ATTN: AFZT-DOC

10TH MTN DIV, FT DRUM, ATTN: AFZS-DOC

FT MCCOY, ATTN: AFRC-FM-DC

NATIONAL TRAINING CENTER & FT IRWIN, ATTN: AFZJ-DC

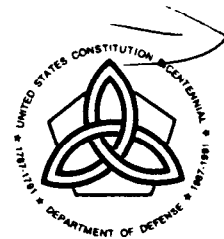
ARMY ATLANTA CONTRACTING CENTER, ATTN: AFLG-PRC



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
UNITED STATES ARMY LEGAL SERVICES AGENCY  
901 NORTH STUART STREET  
ARLINGTON, VA 22203-1837

JUN 18 1997



JALS-CA

6 June 1997

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: ASBCA Case List and Writing Better Final Decisions

1. Enclosed is a listing of active contract dispute cases from your command pending before the Armed Services Board of Contract Appeals and on appeal to the US Court of Appeals for The Federal Circuit. Additional information is enclosed showing Army-wide contract dispute appeals statistics (less Corps of Engineer cases) and points of contact information for attorneys in this office.

2. The overall trend for new cases at the ASBCA is moving downward. However, the number of large dollar appeals -- those of \$1,000,000 -- is growing. I attribute the trend to reductions in the major procurement accounts, improved contract administration, and increased use of Alternative Disputes Resolution (ADR) techniques at the local level to resolve many disputes that would eventually be settled during the litigation process.

3. Attention to detail when preparing final decisions is still a problem.

a. So far this year over one-half of all new Army ASBCA appeals had errors in the contracting officer's final decision! Most were in the mandatory appeals rights language, especially the failure to note the increased limits for expedited and accelerated appeals which were raised 1 October 1995 to \$50,000 and \$100,000 respectively. *These changes appear in FAR Part 33.2.*

b. My biggest concern is not with the cases already in our office; but rather with the unknown number of cases potentially still out there with faulty appellate rights statements. Only with the proper appellate rights language is the government fully protected. Proper language ends the contractor's right to appeal after 90 days (ASBCA) or one year (Court of Federal Claims). Without the proper language we lose the ability to have untimely appeals dismissed and you have to "go to court."

c. I have enclosed a "Practice Tip" on writing better final decisions which may be of assistance to you and your contracting professionals. Please feel free to disseminate it widely throughout your command.

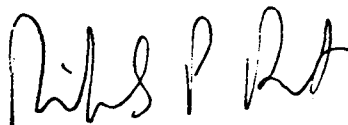


JALS-CA

SUBJECT: ASBCA Case List and Writing Better Final Decisions

4. On a more positive note, enclosed is a copy of the decision in *Defense Systems Company, Inc., ASBCA No. 50534 (25 April 1997)*. FAR 33.211 permits contracting officers to take more than 60 days before issuing a final decision in claims over \$100,000. The DSC case is a good example of steps contracting officers can take to show why more than 60 days may be needed to prepare a final decision in a complex claim.

5. Army Contract Appeals Division -- Your Partners In Litigation.



Nicholas P. Retson  
Colonel, U.S. Army  
Army Chief Trial Attorney

Enclosures

DISTRIBUTION:

Deputy Assistant Secretary of the Army for Procurement, ATTN: SARD-ZP,  
103 Army Pentagon, Washington, DC 20310-0103

Assistant Deputy Chief of Staff for RDA - Acquisition, Contracting and  
Production Management, HQ, U.S. Army Materiel Command,  
ATTN: AMCRDA-A, 5001 Eisenhower Avenue, Alexandria,  
VA 22333-0001

Principal Assistant Responsible for Contracting, HQ, U.S. Army Materiel  
Command, ATTN: AMCRDA-AC (PARC), 5001 Eisenhower Avenue,  
Alexandria, VA 22333-0001

Executive Director, Acquisition Center, U.S. Army Aviation and Troop  
Command, ATTN: AMSAT-A-Z, 4300 Goodfellow Boulevard, St. Louis,  
MO 63120-1798

Principal Assistant Responsible for Contracting, U.S. Army Chemical and  
Biological Defense Command, ATTN: AMSCB-PO, Building E4455,  
Aberdeen Proving Ground, MD 21010-5423

Director, CECOM Acquisition Center, U.S. Army Communications-  
Electronics Command, ATTN: AMSEL-AC, Fort Monmouth, NJ  
07703-5000

Deputy Chief of Staff for Acquisition, U.S. Army Industrial Operations  
Command, ATTN: AMSIO-AC, Rock Island, IL 61299-6000

Director of Acquisition Center, U.S. Army Missile Command, ATTN:

# **CONTRACTING ACTIVITIES<sup>1</sup>**

## **SUPPORTED BY ARMY CHIEF TRIAL ATTORNEY<sup>2</sup>**

<b>AMC</b>	<b>Army Materiel Command</b>
ATCOM	Aviation & Troop Command
CECOM	Communications-Electronics Command
	-ASC: Army Signal Command (Formerly ISC)
	-CAC-WOO: CECOM Acquisition Center-Washington Operations Office (Formerly ISSAA)
IOC	Industrial Operations Command
MICOM	Missile Command
STRICOM	Simulation Training & Instrumentation Command
TACOM	Tank Automotive Command
OTHAMC	Other Army Materiel Command (DCS-Proc HQ AMC)
	-ARL: Army Research Laboratory
	-ARO: Army Research Office
	-CBDCOM: Chemical & Biological Defense Command
	-PMSANG: Program Manager, SANG Modernization Program
	-SSCOM: Soldier Systems Command
	-TECOM: Test & Evaluation Command
	-USMA: U.S. Military Academy
<b>FORSCOM</b>	<b>Forces Command</b>
<b>MEDCOM</b>	<b>Medical Command</b>
<b>MTMC</b>	<b>Military Traffic Management Command</b>
<b>NGB</b>	<b>National Guard Bureau</b>
<b>TRADOC</b>	<b>Training &amp; Doctrine Command</b>
<b>USAREUR</b>	<b>U.S. Army, Europe</b>
<b>OTHERS</b>	<b>Other Contracting Activities</b>
AAFES	Army-Air Force Exchange Service <sup>3</sup>
CSA	Contract Support Agency
DSSW	Defense Supply Service-Washington
EUSA	Eighth U. S. Army
INSCOM	Intelligence & Security Command
MDW	Military District Washington
MR&MC	Medical Research & Materiel Command
USSOCOM	Special Operations Command (includes previous "MDA" contract numbers) <sup>4</sup>
SSDC	Space & Strategic Defense Command
USARCENT	U.S. Army Central Command/3rd Army
USARPAC	U.S. Army, Pacific
USARSO	U.S. Army, South

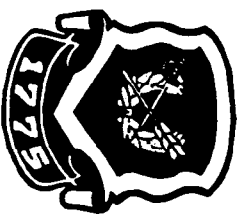
<sup>1</sup> See DFARS 202.101

<sup>2</sup> COE Serviced by Engineer Chief Trial Attorney (See AFARS 33.212-90)

<sup>3</sup> Per HQDA-HQAF MOU (1JUN90)

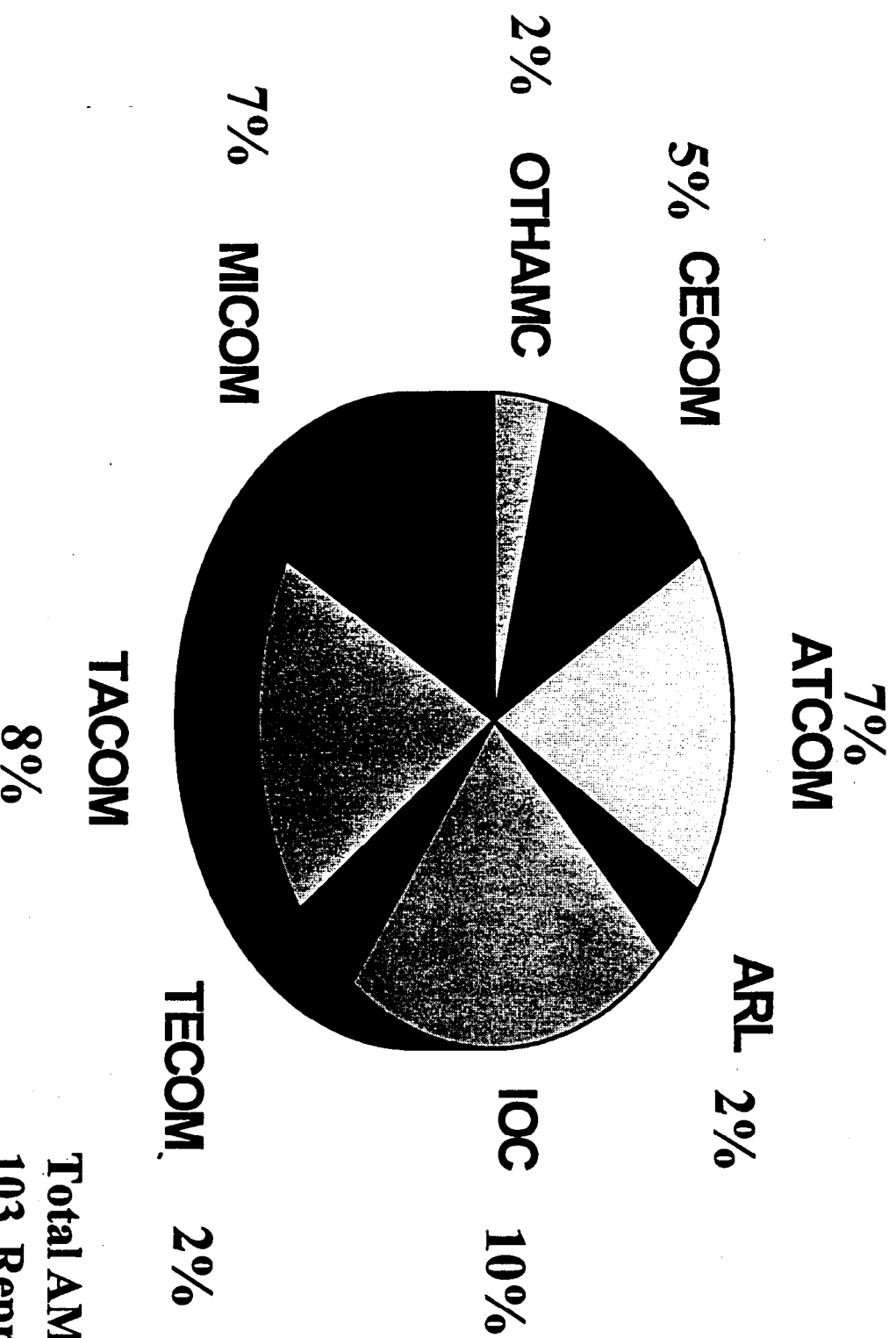
<sup>4</sup> Not an Army HCA. Support provided via MOU (expenses reimbursed) (6DEC93)

US ARMY LEGAL SERVICES AGENCY - CONTRACT APPEALS DIVISION					
901 N. Stuart, St., Room 500, Arlington, VA 22203-1837					
Area Code (703) 696-1500 (or) DSN 426-1500				Updated 30 Apr 97	
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CLARKE, CRAIG	DCTA	A	696-1515	426-1515	clarkecr@otjag.army.mil
DECKER, JAMES	O/A	A	696-2842	426-2842	deckerja@otjag.army.mil
DOOLEY, STEPHEN	LTC	A	696-2818	426-2818	dooleyst@otjag.army.mil
WOOD, SONDRRA	Sec	A	696-1511	426-1511	woodsond@otjag.army.mil
STROUD, LEIGH	BONDS	B	696-1522	426-1522	stroudle@otjag.army.mil
TINDLE, MARY	BONDS	B	696-1523	426-1523	tindlema@otjag.army.mil
WADE-FENTRESS, BELINDA	Docket	D	696-1500	426-1500	fentresb@otjag.army.mil
WASHINGTON, SHERYL	Docket	D	696-2857	426-2857	washings@otjag.army.mil



# AMC Active Appeals

-As a Percentage of all Army Appeals-



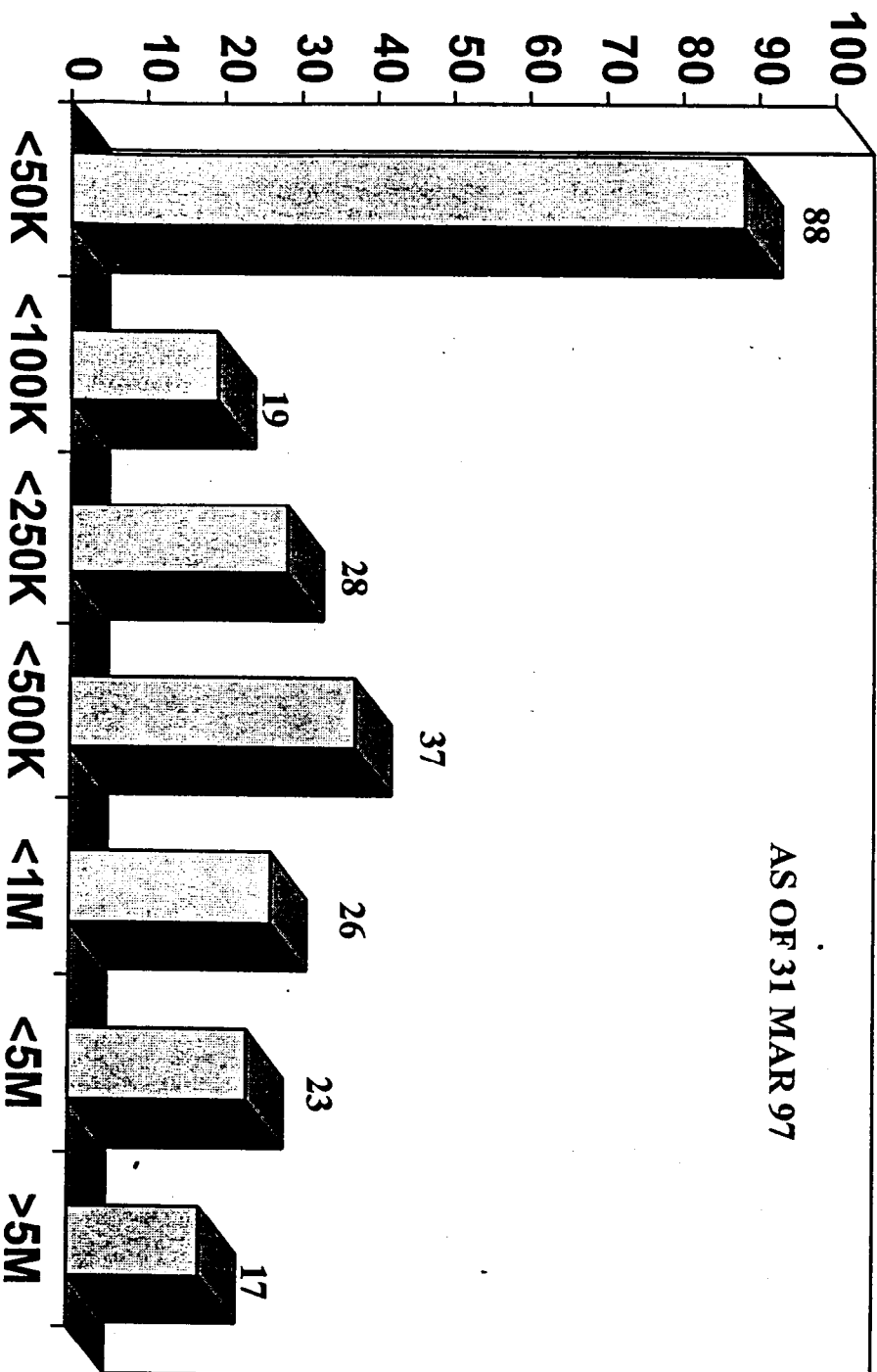
Total AMC Appeals =  
103, Representing 43%  
of all Army Appeals

As of 31 March 97



# Army Active Appeals

- By Litigation Value -

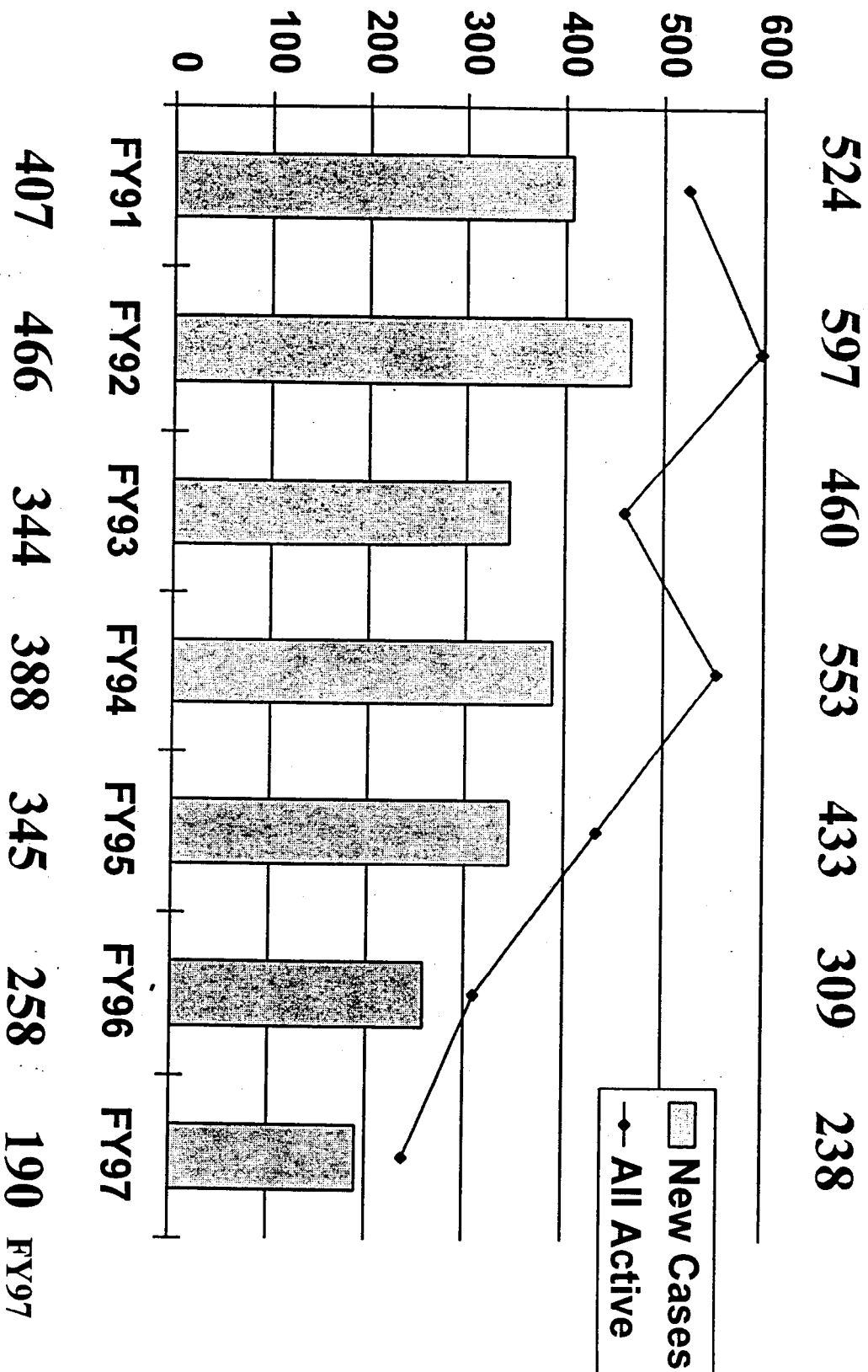


**Total  
Appeals  
238**



# Army ASBCA Appeals

As of 31MAR97



Totals do not include COE

Estimate

**ARMED SERVICES BOARD OF CONTRACT APPEALS**

Appeal of --	)	
	)	
Defense Systems Company, Inc. <sup>1</sup>	)	ASBCA No. 50534
	)	
Under Contract No. DAAA09-92-C-0477	)	

APPEARANCES FOR APPELLANT:

Joseph S. Wager, Esq.  
Jon N. Kulish, Esq.  
Hass & Najarian  
Washington, DC

APPEARANCES FOR THE GOVERNMENT:

COL Nicholas P. Retson, JA  
Chief Trial Attorney  
CPT Patrick B. Kernan, JA  
Trial Attorney  
CPT William Hinchman, JA  
Trial Attorney

**OPINION BY ADMINISTRATIVE JUDGE TING**  
**ON THE GOVERNMENT'S MOTION TO DISMISS**  
**FOR LACK OF JURISDICTION**

Defense Systems Company, Inc. ("DSC") submitted a \$71 million "Claim for Breach" to an Army contracting officer. The contracting officer notified DSC that due to the complexity of the claim, he would issue his decision on the claim on 11 July 1997, nine months after receipt. DSC appealed the contracting officer's failure to issue a decision on the date DSC designated -- 31 January 1997 -- as when the decision should be issued. After the Board docketed the appeal, the Army filed the instant motion to dismiss, contending that DSC's appeal was premature, and we have no jurisdiction.

---

<sup>1</sup> The contract was awarded to BEI Defense Systems Company. The contractor is a wholly owned subsidiary of BEI Electronics, Inc., a publicly traded independent holding company with corporate offices in San Francisco (Complaint ¶ 12). Appellant's Notice of Appeal referred to itself as "Defense Systems Company, Inc." For purposes of this appeal and in the interest of consistency, we will consider Defense Systems Company, Inc., or DSC as the appellant.

## FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 9 April 1992, the United States Army Industrial Operations Command ("IOC") awarded DSC Contract No. DAAA09-92-C-0477 for production and delivery of specified quantities of HYDRA 70 Rocket Systems. The contract was for a firm fixed price of \$47,625,609.90.

2. By letter dated 1 October 1996, DSC submitted to the Procuring Contracting Officer (PCO) its "Claim for Breach" of the contract. DSC claimed "Cost, Fee and Damages" in the total amount of \$71,999,163.

3. The "Claim for Breach" was accompanied by a "Certificate Of Current Cost Or Pricing Data" signed by DSC's Vice President/Chief Financial Officer on 30 September 1996. This certificate stated:

This is to certify that, to the best of my knowledge and belief, the cost or pricing data (as defined in section 15.801 of the Federal Acquisition Regulation [FAR] and required under FAR subsection 15.804-2) submitted, either actually or by specific identification in writing, to the contracting officer or the contracting officer's representative in support of BEI's Breach Claim under Contract DAAA09-92-C-0477 are accurate, complete, and current as of 30 September 1996. This certificate includes the cost or pricing data supporting any advanced agreements and forward pricing rate agreements between the offeror and the Government that are part of the proposal.

4. The submitted "Claim for Breach" was in two volumes. Volume 1 contains 162 pages and included five sections: I. Introduction And Executive Summary, II. Statement Of Facts, III. Quantum, IV. Statement Of Entitlement, and V. Summary And Conclusions. Volume 2 contains 49 exhibits.

5. DSC's cover letter to its "Claim for Breach" requested "an immediate final decision on this claim." The letter went on to say "In view of the past history, it would be reasonable to expect that your final decision on entitlement could be issued within sixty (60) days of your receipt of this claim." The letter concluded with the statement "we will proceed with the litigation at the conclusion of the sixty (60) day period in the event no final decision has been issued."



6. The Government received DSC's "Claim for Breach" on 3 October 1996. By letter dated 22 November 1996, the PCO advised DSC:

Under the Contract Disputes Act of 1978 (CDA), all claims by a contractor against the Government seeking payment of a sum certain exceeding \$100,000 must be certified in accordance with the Act (See 41 U.S.C. Section 605(c)(1)). You are hereby notified that your attempted certification of the subject claim is considered defective in accordance with the requirements of the CDA. In particular, your attempted certification is found to be defective for the following reasons:

(1) The Certificate of Current Cost and Pricing Data provided with the claim fails to certify that the claim is made in good faith and;

(2) The Certificate of Current Cost and Pricing Data provided with the claim fails to certify that the amount requested accurately reflects the contract adjustment for which you believe the Government is liable.

You are requested to correct these defects in the attempted certification accompanying the subject claim. In accordance with the CDA, you are advised to submit a certification substantially similar to the following:

'I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.'

7. In the same letter, the PCO advised DSC that notwithstanding the defects in DSC's certification, he had nonetheless "began reviewing and considering the subject claim." The PCO advised that a contracting officer decision on the subject claim "will be issued on or before July 11, 1997."

8. The PCO justified the 11 July 1997 decision date on the bases that DSC's "Claim for Breach" made allegations of the adequacy of the technical data package

provided not only under the 1992 contract but with respect to "contracts that have been . . . issued and administered by other commands and contracting offices." In addition, DSC was said to have made "complex allegations regarding international markets, foreign policy and business forecasting." The PCO stated that he needed external technical analysis and support in reviewing DSC's "Claim for Breach," and many people with personal knowledge of the facts alleged were no longer employed by the Army.

9. By letter dated 25 November 1996, DSC forwarded a CDA claim certification "in the format requested." The certification was backdated to 30 September 1996.

10. In a letter dated 4 December 1996 to the PCO, DSC took strong exception to the projected 11 July 1997 decision date. DSC contended that the 11 July 1997 date, being "more than nine (9) months after receipt [of its 1 October 1996 'Claim for Breach'] was unreasonable" because "The substantive issues raised by the claim were raised by DSC throughout contract performance." DSC contended that "the Government has had ample time to render a final decision . . . [and] nine months after receipt, does not represent a good faith effort to resolve the Breach of Contract claim." It went on to say:

Although wholly unwarranted . . . DSC will extend the deadline for the issuance of the final decision until January 31, 1997. The extension is overly generous, and is without prejudice to the company's position that the final decision should already have been rendered.

11. No contracting officer decision was issued on 31 January 1997. On 1 February 1997, DSC filed with the Board its Notice of Appeal. The appeal was taken from the "constructive denial of DSC's breach claim . . . and, alternatively, for failure of the contracting officer to render a final decision within the period prescribed by the Contract Disputes Act of 1978." DSC tells us that it had advised the Government by "formal notification that the litigation would commence on 31 January 1997." Thereafter, the Board docketed DSC's appeal as ASBCA No. 50534.

12. On 5 March 1997, the Board received from DSC a 97-page complaint. On the same day, the Board received from the Government a motion to dismiss for lack of jurisdiction.

13. Attached to the Government's motion was an affidavit from the PCO elaborating on the reasons for establishing 11 July 1997 as the date on which he will issue a decision. The affidavit stated that the HYDRA 70 Rocket System was being procured for all three branches of the Department of Defense (Army, Navy and Air Force), and a "wide array of offices" within each branch had and still have significant involvement in

the HYDRA 70 Program. In addition, several different offices (the Procuring Contracting Office, the Hydra Program Office and the Engineering Branch) of the Industrial Operation Command, Rock Island, Illinois, were involved in the Contract. The PCO stated that he had requested each one of the affected offices to furnish him an initial response to the DSC claim by 4 April 1997. Based on these responses, the PCO planned to finish a draft contracting officer decision by 9 May 1977. He has established 13 June 1997 for the various offices to provide clarification and additional data to his draft decision. He will then "[C]onsolidate and finalize [his] response and issue a Final Decision on or before 11 July 1997." The PCO also tells us:

Based on the schedule I established, with input on the schedule from field offices, I believe the schedule for issuing a Final Decision is reasonable. DSC raises serious allegations involving a large amount of money. Therefore, I believe it is especially important to provide a thoughtful Final Decision. Requiring the Government to render a decision prior to 11 July 1997, would seriously jeopardize the Government's ability to address each issue raised by DSC.

14. DSC opposed the Government's motion to dismiss and filed a reply which was received by the Board on 4 April 1997.

### DECISION

Since the claimed amount in this case exceeded \$100,000, Section 6(c)(2) (41 U.S.C. § 605(c)(2)), gave the contracting officer 60 days after receipt of a submitted claim to either (A) issue a decision or (B) notify the contractor of the time within which a decision will be issued. 41 U.S.C. § 605(c)(2)(A) and (B). In this instance, the contracting officer did not choose to issue a decision within 60 days after he received DSC's "Claim for Breach."<sup>2</sup> Instead, he chose to notify DSC within 60 days after he received the "Claim for Breach" that he would issue his decision by a date certain – 11 July 1997. Agency boards and the Court of Federal Claims have held that as long as the contracting officer notified the contractor of a date certain on which a decision will be issued, he would have complied with the requirement of 41 U.S.C. § 605(c)(2)(B). Boeing Co. v. United States, 26 Cl. Ct. 257, 259 (1992) ("[if] the claim is substantial and will require a long period of time to address, then the contracting officer's only option is

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<sup>2</sup> The PCO's 22 November 1996 notification of when he would issue his decision was within 60 days of receipt by him on 3 October 1996 of DSC's defectively certified "Claim for Breach." The notification, however, predated DSC's corrected certification furnished by its letter dated 25 November 1996. (Findings 6 and 9)

to fix a date far enough into the future to assure a complete evaluation.”); Aerojet General Corp., ASBCA No. 48136, 95-1 BCA ¶ 27,470.

Section 6(c)(3) of the CDA required:

The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

Here, the claimed amount exceeded \$71 million. The narrative portion of the claim alone exceeded 162 pages. Based on our review of the materials before us, and of the PCO's affidavit, we conclude that the PCO's established decision date of 11 July 1997 is reasonable for a substantial claim such as the one here.

Section 6(c)(4) of the CDA (41 U.S.C. § 605(c)(4)) provides that “A contractor may request the tribunal concerned to direct a contracting officer to issue a decision in a specified period of time, as determined by the tribunal concerned, in the event of undue delay on the part of the contracting officer.” Board Rule 1(e) implements this section of the CDA. See, e.g., Brunswick Corp., ASBCA No. 44243-652, 93-1 BCA ¶ 25,300. We have determined that, at this juncture, there is no undue delay on the part of the PCO in issuing a decision on DSC's “Claim for Breach.” Nor has DSC formally petitioned us pursuant to Rule 1(e) to direct the PCO to issue a decision by a specified date.

DSC is not without remedy to proceed with litigation of its “Claim for Breach” at the appropriate time. Its right to do so, however, is prescribed by Section 6(c)(5) (41 U.S.C. § 605(c)(5)) of the CDA. That section of the law required “failure by the contracting officer to issue a decision on a contract claim within the period required” (emphasis added). There has been no failure to issue a decision within the period required. Should the PCO fail to issue a decision as promised, DSC may then avail itself of the statutory remedy provided in Section 6(c)(5) (41 U.S.C. § 605(c)(5)) of the CDA.

Because the PCO has fully complied with the statutory duty imposed upon him by 41 U.S.C. § 605(c)(2), and because the time period the PCO sought to render a considered decision is reasonable, we hold that DSC's appeal, at this junction, is premature.

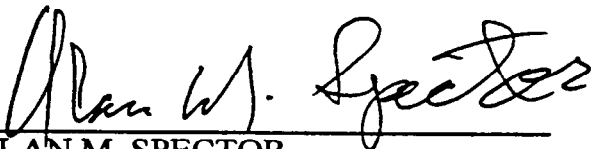
Therefore, we grant the Government's motion and dismiss this appeal for lack of jurisdiction.

Dated: 25 April 1997



PETER D. TING  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



ALAN M. SPECTOR  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur



MARK N. STEMPLER  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 50534, Appeal of Defense Systems Company, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals



## PRACTICE TIPS for our PARTNERS IN LITIGATION



### TOPIC: Better Final Decisions Reduce Unnecessary Litigation

**PURPOSE:** To provide Contract Appeals Division's (CAD) Partners in Litigation with information on steps they can take to help prevent contract disputes litigation in the first place and, if it cannot be prevented, cast the Government in the best light possible from the outset.

1. **Background.** Improper action or even inaction by Contracting Officers in response to a contractor's claim often results in appeals being unnecessarily docketed at the Armed Services Board of Contract Appeals (ASBCA). Significant portions of these appeals can be prevented or even settled by performing several, simple, housekeeping checks prior to issuing a Final Decision.

2. **Eliminate Appeals of "Deemed Denials."**

a. There are only two possible contractor actions that will properly result in the commencement of ASBCA litigation: (1) an appeal within 90 days after receipt of a Contracting Officer's Final Decision; or (2) an appeal from the Contracting Officer's failure to issue a Final Decision after 60 days have elapsed from a claim submission - a "*deemed denial*." From a litigation perspective, having to deal with a "*deemed denial*" appeal places the government behind the eight ball and puts the ASBCA, rather than the Contracting Officer, in control of the claims review process.

b. A Contracting Officer is required to issue a Final Decision on contractor claims of \$100,000 or less within 60 days after receiving a written request that a decision be rendered, or within a reasonable time if the contractor does not make such a request. FAR 33.211(c) (1). Failure to do this can be construed as a "deemed denial."

c. A Contracting Officer is required to issue a Final Decision on certified contractor claims of more than \$100,000 within 60 days after receipt; however, if a decision will not be issued within 60 days, the Contracting Officer shall notify the contractor within that period of a date certain when a Final Decision will be rendered, provided that such a decision will be issued within a reasonable period of time. FAR 33.211(c)(2), (d). Failure to do this can also be construed as a "deemed denial."

"PRACTICE TIPS" and "ADR SERIES" are prepared by members of the US Army Contract Appeals Division as an element of our "Partners in Litigation" program. They are intended to share practical experiences of those involved at all stages of the contract disputes process. Your ideas, comments, experiences, and improvements are welcome at any time (703) 696-1500; FAX (703) 696-1535; DSN 426 + ext.

## **PRACTICE TIPS: BETTER FINAL DECISIONS REDUCE UNNECESSARY LITIGATION**

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***PRACTICE TIP: If the Contracting Officer is unable to issue a Final Decision within the required 60 days, notify the contractor in writing of the date certain by which the Final Decision will be issued.***

d. The Contracting Officer may request that the contractor provide additional information and supporting documentation if it is determined that there is insufficient or inadequate information upon which to render a Final Decision. Such requests must be made within the 60 day period and must be reasonable under the circumstances (size and complexity of the claim; alleged basis for entitlement). If the contractor fails to respond to such requests, or asserts that it has provided sufficient information for issuance of a Final Decision, the Contracting Officer should document the chronology of events and issue a decision within the requisite time period, denying the claim in its entirety for lack of information and documentation. There should never be a situation where the Government does not issue a Final Decision. At a minimum, issue a timely Final Decision denying the claim.

***PRACTICE TIP: Always make a decision. Deny an unsupported claim. Final Decisions should document the Contracting Officer's good faith attempts to obtain meaningful information and that the contractor's failure to provide it was the sole reason that the claim was denied.***

3. **Checking Certifications.** A contractor claim exceeding \$100,000 must contain the certification language substantially the same as that contained at FAR 33.207. An incomplete certification can be corrected but if no certification at all is provided the claim is jurisdictionally deficient and the contractor's right to interest on the claim does not begin to run. If the claim does not include the requisite language, the Contracting Officer shall promptly notify the contractor and request that the contractor comply with the certification requirement.

***PRACTICE TIP: Every contractor certification must receive meticulous scrutiny.***

4. **Content.** Every Final Decision must contain a description of the claim or dispute; reference the relevant contract terms; contain a complete statement of the factual areas of agreement and disagreement; provide a statement of the Contracting Officer's determination and the basis therefore; and the requisite appellate rights language set forth at FAR 33.211(a)(4).

"This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to the agency board of contract appeals, you may, solely at

## PRACTICE TIPS: BETTER FINAL DECISIONS REDUCE UNNECESSARY LITIGATION

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your election, proceed under the board's small claims procedure for claims of \$50,000 or less or its accelerated procedure for claims of \$100,000 or less. Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision."

In cases where the decision results in a finding that the contractor is indebted to the Government, include a demand for payment prepared in accordance with FAR 32.610(b). From a litigation perspective, having the proper language is the only way to establish an outer limit on when the contractor can properly engage the Government in litigation.

***PRACTICE TIP: Don't be creative here. Failure to include in the Final Decision anything other than the verbatim appellate rights language at FAR 33.211(a)(4) runs the risk of creating unnecessary litigation procedural issues.***

### **5. Litigation is intense: be prepared.**

a. A Final Decision should be fully supported by the available evidence. Too often Contracting Officers and their attorneys rely strictly on oral communications with government personnel to form the basis for their Final Decision. Our experience has shown that contracting activities that assemble all relevant documents and review them in detail, generally write and issue higher quality Final Decisions.

b. This formalized, structured collection of relevant documents helps the Contracting Officer and attorney formulate a better Final Decision document. It encourages a Final Decision that includes paying those parts of the claim that should be paid and denying those for which the government has actual evidence to support its decision. As an added benefit, it collects in one place the documents needed to prepare a formal Rule 4 File should the decision be appealed.

c. In the Air Force, all proposed final decisions over \$25,000 are forwarded, with appropriate backup documentation, to Wright-Patterson Air Force Base, Ohio, for a litigation review by the Air Force Chief Trial Attorney's office before the Contracting Officer can actually issue the Final Decision.

***PRACTICE TIP: Don't rely on just oral communications as the basis for the Contracting Officer's Final Decision. The best Final Decisions are written after actual review of all available documents.***



# **U. S. ARMY LITIGATION CENTER CONTRACT APPEALS DIVISION ARMY ASBCA CASES (BY HCA) (ACTIVE)**

-As of 06/13/97-

HCA	NUMBER	PERCENT	VALUE OF CLAIMS			
			ALL CLAIMS	% OF ALL CLAIMS	TOTAL CLAIMS	GOVT CLAIMS
AAFEs	5	2.1%	\$2,622,814	0.6%	\$2,622,814	\$0
ARL	2	0.8%	\$1,395,942	0.3%	\$1,395,942	\$0
ATCOM	18	7.6%	\$96,666,093	20.7%	\$92,678,474	\$3,987,619
CECOM	8	3.4%	\$2,040,254	0.4%	\$2,040,254	\$0
CSA	1	0.4%	\$42,465,466	9.1%	\$42,465,466	\$0
DSSW	2	0.8%	\$15,457	0.0%	\$15,457	\$0
FORSCOM	31	13.1%	\$4,774,291	1.0%	\$4,739,302	\$34,989
IOC	21	8.9%	\$49,651,354	10.6%	\$46,164,598	\$3,486,756
MEDCOM	15	6.4%	\$6,809,801	1.5%	\$6,797,801	\$12,000
MICOM	13	5.5%	\$67,507,428	14.4%	\$67,015,378	\$492,050
MTMC	7	3.0%	\$422,024	0.1%	\$422,024	\$0
NGB	11	4.7%	\$4,154,485	0.9%	\$4,154,485	\$0
OTHAMC	4	1.7%	\$1,608,540	0.3%	\$1,608,540	\$0
SSCOM	2	0.8%	\$38,327	0.0%	\$38,327	\$0
TACOM	19	8.1%	\$131,330,752	28.1%	\$124,385,054	\$6,945,698
TECOM	10	4.2%	\$6,836,482	1.5%	\$6,759,177	\$77,305
TRADOC	33	14.0%	\$5,633,114	1.2%	\$5,633,114	\$0
USARCENT	1	0.4%	\$29,125,673	6.2%	\$29,125,673	\$0
USAREUR	24	10.2%	\$12,985,093	2.8%	\$12,865,093	\$10,120,000
USARPAC	3	1.3%	\$174,148	0.0%	\$165,541	\$8,607
USARSO	1	0.4%	\$18,850	0.0%	\$18,850	\$0
USASOC	1	0.4%	\$52,583	0.0%	\$52,583	\$0
USMA	4	1.7%	\$1,000,713	0.2%	\$1,000,713	\$0
TOTALS	236	100.0%	\$467,329,684	100.0%	\$442,164,660	\$25,165,024

# U.S. ARMY LITIGATION CENTER CONTRACT APPEALS DIVISION CASES CLOSED FY97 THRU 2ND QTR

## FORSCOM

ASBCA	APPELLANT	CONTRACT SLIDE	CONTRACT NUMBER	DESCRIPTION	APPELLANT CLAIM	APPELLANT AWARD	GOVERNMENT CLAIM	GOVERNMENT AWARD
49079	Westland Mechanical,	Ft Carson, CO	DAK45-93-C-0041	Dis w/Prej-Settled	\$0	\$0	\$0	\$0
48844	Westland Mechanical,	Ft Carson, CO	DACA45-93-D-0041	Dis w/Prej-Settled	\$177,176	\$5,000	\$0	\$0
49152	Ayer Moving & Storage	Ft Devens, MA	DAKF31-95-M-0900	Dis w/Prej-Settled	\$0	\$0	\$1,888	\$500
48521	Transco Contracting	Ft Sam Houston	DAKF49-92-D-0012	Dis w/Prej-Settled	\$463,979	\$144,050	\$0	\$0
47904	Transco Contracting	Ft Sam Houston	DAKF49-92-D-0013	Dis w/Prej-Settled	\$0	\$0	\$5,177	\$0
47907	Transco Contracting	Ft Sam Houston	DAKF49-92-D-0013	Dis w/Prej-Settled	\$0	\$0	\$5,181	\$0
48522	Transco Contracting	Ft Sam Houston	DAKF49-92-D-0013	Dis w/Prej-Settled	\$227,965	\$70,950	\$0	\$0
7					\$869,120	\$220,000	\$12,246	\$500
49527	MDP Construction, In	Ft Carson, CO	DAKF06-93-D-0029	Decision-Denied	\$67,618	\$0	\$0	\$0
49176	RC 27th Avenue Corpo	Ft Dix, NJ	DAKF29-95-B-0033	Decision-Denied	\$30,925	\$0	\$0	\$0
2					\$98,543	\$0	\$0	\$0
49390	Poor Boy's Ground Ma	Ft Stewart, GA	DAKF10-91-D-0015	Dis w/Prejudice	\$48,280	\$0	\$0	\$0
50144	CJP Contractors	Ft Stewart, GA	DAKF10-93-C-0089	Dis w/Prejudice	\$75,862	\$19,524	\$0	\$0
47610	Andrews Maintenance	Ft Campbell, KY	DAKF23-93-C-0081	Dis w/Prejudice	\$0	\$0	\$64,614	\$0
49059	Services Unlimited	Ft Dix, NJ	DAKF29-95-M-1183	Dis w/Prejudice	\$630	\$0	\$0	\$0
49060	Services Unlimited	Ft Dix, NJ	DAKF29-95-M-1184	Dis w/Prejudice	\$630	\$0	\$0	\$0
49058	Services Unlimited	Ft Dix, NJ	DAKF29-95-M-1202	Dis w/Prejudice	\$630	\$0	\$0	\$0
49061	Services Unlimited	Ft Dix, NJ	DAKF29-95-M-1204	Dis w/Prejudice	\$630	\$0	\$0	\$0
49057	Services Unlimited	Ft Dix, NJ	DAKF29-95-M-1209	Dis w/Prejudice	\$630	\$0	\$0	\$0
49062	Services Unlimited	Ft Dix, NJ	DAKF29-95-M-1233	Dis w/Prejudice	\$630	\$0	\$0	\$0
9					\$127,922	\$19,524	\$64,614	\$0
50438	Konza Construction C	Ft Riley, KS	DAKF19-95-D-0012	Dis w/Prej-Motion	\$48,080	\$0	\$0	\$0
49786	Nevada Building Main	Ft McCoy, WI	DAKF61-95-D-0011	Dis w/Prej-Motion	\$49,345	\$0	\$0	\$0
49824	Carpet Carriage Deco	Ft McCoy, WI	DAKF61-95-M-2590	Dis w/Prej-Motion	\$4,127	\$0	\$0	\$0
3					\$101,552	\$0	\$0	\$0
49945	BH Services, Inc.	Ft Stewart, GA	DAKF10-92-D-0074	Decision-Sustained	\$48,379	\$0	\$0	\$0
1					\$48,379	\$0	\$0	\$0

FORSCOM TOTALS

22

\$1,245,516

\$239,524

\$56,860

\$500

# FORSCOM ACTIVE APPEALS

-As of 06/11/97-

## Annville, PA

ASBCA	APPELLANT	RECEIVED	STATUS	APPL CLAIM	GOVT CLAIM	CONTRACT NO.	ATTORNEY
50662	Crosby's General Con	03/31/97	Dismissal Pending (App Settled	\$135	\$0	DAK36-95-W-2728	MCCAFFREY

## Totals Annville, PA

1

\$135

\$0

## California

ASBCA	APPELLANT	RECEIVED	STATUS	APPL CLAIM	GOVT CLAIM	CONTRACT NO.	ATTORNEY
50360	Graham International	11/20/96	Reply to Bd Order	\$20,500	\$0	DAK57-95-D-0001	GIBBS

## Totals California

1

\$20,500

\$0

## Ft Bragg, NC

ASBCA	APPELLANT	RECEIVED	STATUS	APPL CLAIM	GOVT CLAIM	CONTRACT NO.	ATTORNEY
49105	David's Econo-Move,	08/28/95	Hearing	\$554,275	\$0	DAKF40-93-D-0012	STEVENSO
49562	David's Econo-Move,	02/12/96	Hearing	\$0	\$34,989	DAKF40-93-D-0012	STEVENSO

## Totals Ft Bragg, NC

2

\$554,275

\$34,989

## Ft Carson, CO

ASBCA	APPELLANT	RECEIVED	STATUS	APPL CLAIM	GOVT CLAIM	CONTRACT NO.	ATTORNEY
49515	Lambrecht & Sons, In	01/29/96	RECORD CLOSED PEND BD DECISION	\$27,518	\$0	DAKF06-93-D-0033	HEHR

## Totals Ft Carson, CO

1

\$27,518

\$0

## Ft Carson, CO

ASBCA	APPELLANT	RECEIVED	STATUS	APPL CLAIM	GOVT CLAIM	CONTRACT NO.	ATTORNEY
50603	MOP Construction, In	03/11/97	Govt Brief	\$45,852	\$0	DAKF06-93-D-0031	HEHR

## Totals Ft Carson, CO

1

\$45,852

\$0

# Ft Irwin, CA

ASBCA	APPELLANT	RECEIVED	STATUS	APLT CLAIM	GOVT CLAIM	CONTRACT NO.	ATTORNEY
49714	DynCorp	04/04/96	PENDING DECISION ON MOTION	\$755,929 ✓	\$0	DAKF04-91-C-0072	ATTORNEY STEVENSO
50142	Economos Painting	09/05/96	Discovery Phase	\$75,862	\$0	DAKF04-94-D-0011	O'FARREL

# Totals Ft Irwin, CA

2

\$831,791

\$0

# Ft Lewis, WA

ASBCA	APPELLANT	RECEIVED	STATUS	APLT CLAIM	GOVT CLAIM	CONTRACT NO.	ATTORNEY
50435	Graham International	12/27/96	PENDING DECISION ON MOTION	\$21,900	\$0	DAKF57-95-D-0002	ATTORNEY GIBBS
50481	Graham International	01/15/97	PENDING DECISION ON MOTION	\$1,900	\$0	DAKF57-95-C-0125	GIBBS
50714	Wade Perrow Construc	05/07/97	Govt Answer	\$22,493	\$0	DAKF57-96-C-0063	SCHULER

# Totals Ft Lewis, WA

3

\$46,293

\$0

# Ft McCoy, WI

ASBCA	APPELLANT	RECEIVED	STATUS	APLT CLAIM	GOVT CLAIM	CONTRACT NO.	ATTORNEY
50434	Graham International	12/27/96	Reply to Bd Order	\$15,200	\$0	DAKF57-95-D-0003	ATTORNEY GIBBS
50539	Military Management	02/05/97	Discovery Phase	\$26,381	\$0	DAKF03-94-D-0013	DUFFY
50612	Central Contracting	03/12/97	Govt Answer	\$8,768	\$0	DAKF61-96-D-0032	DUFFY
50784	Central Contracting	06/06/97	Aplt Complaint	\$28,660	\$0	DAKF61-96-D-0032	DUFFY
50794	Central Contracting	06/10/97	Aplt Complaint	\$28,660	\$0	DAKF61-96-D-0032	DUFFY

# Totals Ft McCoy, WI

5

\$107,669

\$0

# Ft McPherson, GA

ASBCA	APPELLANT	RECEIVED	STATUS	APLT CLAIM	GOVT CLAIM	CONTRACT NO.	ATTORNEY
46683	Adventure Group, Inc	10/22/93	Aplt Motion	\$270,000	\$0	DAKF11-92-C-0059	ATTORNEY ANDERSON
49338	Adventure Group, Inc	12/07/95	Reply to Bd Order	\$257,799	\$0	DAKF11-92-C-0059	ANDERSON
50001	United Unlimited Con	07/15/96	Status Report Due	\$28,503	\$0	DAKF11-95-C-0021	MODESSTO
50751	Press X-Press Dry Cl	05/21/97	Aplt Complaint	\$345,162 ✓	\$0	DAKF11-96-D-0013	GUDEN

# Totals Ft McPherson, GA

4

\$901,464

\$0

# Ft Polk, LA

ASBCA	APPELLANT	RECEIVED	STATUS	APLT CLAIM	GOVT CLAIM	CONTRACT NO.	ATTORNEY
50036	Jay Automotive Speci	07/26/96	Hearing	\$120,650	\$0	DAKF24-92-D-0047	ATTORNEY DUECASTE
50235	Control Line, Inc.	10/15/96	Hearing	\$49,552	\$0	DAKF24-95-D-0036	ANDERSON

# Totals Ft Polk, LA

2

\$170,202

\$0

# Ft Riley, KS

ASBCA	APPELLANT	RECEIVED	STATUS
50310	Quality Trust, Inc.	10/31/96	Status Report Due
50392	Abbot Construction,	12/04/96	Suspended
50402	AAA Engineering & Dr	12/11/96	Aplt Resp Gov Mot

APLT CLAIM	GOVT CLAIM	CONTRACT NO.	ATTORNEY
\$21,122	\$0	DAKF19-94-C-0045	HINCHMAN
\$19,834	\$0	DAKF19-94-C-0068	MCCAFFRE
\$330,412 ✓	\$0	DAKF19-96-C-0011	FRANKE

# Totals Ft Riley, KS

3	\$371,368	\$0
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# Ft Stewart, GA

ASBCA	APPELLANT	RECEIVED	STATUS
49403	Phoenix Management,	12/28/95	PENDING DECISION ON MOTION
50442	CJP Contractors	12/27/96	Discovery Phase
50736	T&M Distributors, In	05/14/97	Govt Answer
50763	BH Services, Inc.	05/29/97	Aplt Complaint

APLT CLAIM	GOVT CLAIM	CONTRACT NO.	ATTORNEY
\$103,301	\$0	DAKF10-93-C-0018	BACON
\$75,862	\$0	DAKF10-93-C-0089	HINCHMAN
\$1,263,561 ✓	\$0	DAKF10-94-F-0037	DUECASTE
\$0	\$0	DAKF10-92-D-0074	SCHULER

# Totals Ft Stewart, GA

4	\$1,442,724	\$0
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# Los Alamitos, CA

ASBCA	APPELLANT	RECEIVED	STATUS
50511	CMS, Inc.	01/27/97	Aplt Resp Gov Mot

APLT CLAIM	GOVT CLAIM	CONTRACT NO.	ATTORNEY
\$207,011	\$0	DAKF03-94-D-0002	GIBBS

# Totals Los Alamitos, CA

1	\$207,011	\$0
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# McPherson, GA

ASBCA	APPELLANT	RECEIVED	STATUS
50752	United Unlimited Con	05/21/97	Aplt Complaint

APLT CLAIM	GOVT CLAIM	CONTRACT NO.	ATTORNEY
\$12,500	\$0	DAKF11-95-C-0021	MODESZTO

# Totals McPherson, GA

1	\$12,500	\$0
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# Total Claims

\$4,739,302	\$34,989
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Total of APLT & GOVT CLAIMS = \$4,774,291

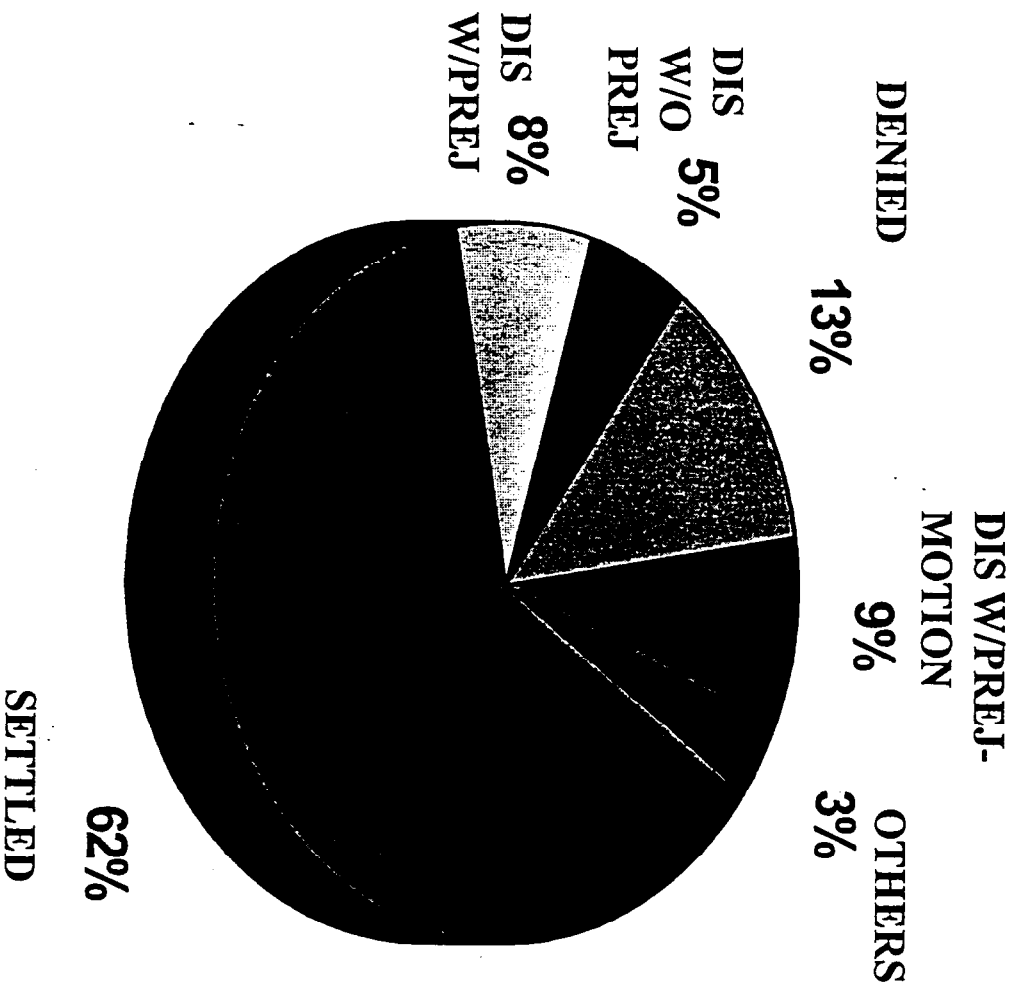
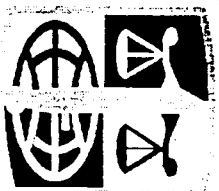
Total Active Appeals for FORSCOM = 31



# CONTRACT APPEALS DIVISION

## Appeals Closed

-FY97 Thru 2nd Qtr-



TOTAL CLOSED=184

- Settled=115 - 7
- Dis w/prej=14 - 9
- Dis w/o prej=10
- Denied=23 - 2
- Dis w/prej-motion=16 - 3
- Others: Split=4, Sustained=1, Transfer=1



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
RESEARCH DEVELOPMENT AND ACQUISITION  
103 ARMY PENTAGON  
WASHINGTON DC 20310-0103

1 AUG 1997

AUG 07 1997

*Post*

SARD-PP

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Fair and Reasonable Prices; Bargaining in the Market Place

Army contracting officers must take all necessary steps, and consider all relevant factors, not only in reaching a determination that the prices paid for supplies and services are fair and reasonable, but also that the prices represent **the best business deals for the Army**. In particular, I am concerned about our practices regarding Federal Supply Schedule contracts and contracts for commercial items with catalog pricing.

**Federal Supply Schedule contracts:**

Using schedule contracts has numerous advantages, one being that a GSA contracting officer has already determined that the prices are fair and reasonable. Therefore, Army contracting officers and ordering activities need not make a separate determination that prices are fair and reasonable, but may rely on GSA's. However, contracting officers cannot blindly accept these prices as the best business deals for the Army.

Because the decision of whether a price is fair and reasonable is a matter of judgment and is dependent upon the circumstances surrounding a particular procurement, the contracting officer needs to be aware that while a price may be fair and reasonable, a lower price (and perhaps a better business deal) may be available. Often, there are deep discounts available to commercial buyers that a contracting officer should be able to discern through **market research**.

The FAR says it may be appropriate to request reductions to schedule prices when schedule products are available elsewhere at lower prices, or when the quantity of an individual order clearly indicates the potential for obtaining a reduced price. GSA now includes in schedule contracts a maximum order threshold as an indicator as to when users should contact the contractor for a lower price. The schedule price should be viewed as a starting point for **further negotiation**.



In order to assure best value for the Army dollar while effectively using schedule contracts, products and prices under multiple contracts shall be reviewed, and the basis for best value determinations documented when orders are issued to other than the low price vendors.

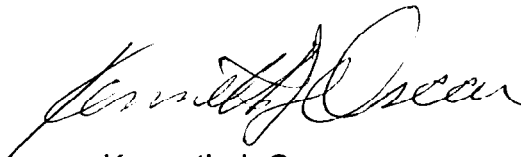
**Commercial Items:**

Changes in the rules for acquiring commercial items have made their acquisition easier, and have also introduced some additional challenges in determining whether prices are fair and reasonable, especially when there is no competition. The clear preference for the acquisition of commercial items does not relieve contracting officers of the need to determine whether prices for commercial items are fair and reasonable and represent the best value for the Army. Contracting officers may not simply rely on the existence of catalog prices in making their determination. Cost or pricing data are not required when purchasing commercial items, but FAR 15.8 provides ample guidance on what can and should be done in pricing commercial items.

Market research and the required price analysis should enable our contracting officers to determine and document the reasonableness of the price and any need for further negotiation. Information other than cost or pricing data may be required to assist in the price analysis, but the amount of such information should be kept to a minimum there are many potential sources for it beyond the suppliers themselves.

The bottom line for buying commercial items, just as in using Federal Supply Schedules and similar instruments, is that we must become world class customers and buyers; adopt commercial practices, and **Negotiate, Negotiate and Bargain some more.** There is no substitute for knowledgeable professionals exercising their best business judgment.

As always, I want to hear your success stories in this regard. My point of contact for this matter is Mr. Curtis Stevenson, DSN 225-8476, [stevensc@sarda.army.mil](mailto:stevensc@sarda.army.mil).

A handwritten signature in black ink, appearing to read 'Kenneth J. Oscar', written in a cursive style.

Kenneth J. Oscar  
Acting Assistant Secretary of the Army  
(Research, Development and Acquisition)



AUG 14 1997



DEPARTMENT OF THE ARMY  
HEADQUARTERS, UNITED STATES ARMY FORCES COMMAND  
1777 HARDEE AVENUE SW  
FORT MCPHERSON, GEORGIA 30330-1062

REPLY TO  
ATTENTION OF

AFRM

4 August 1997

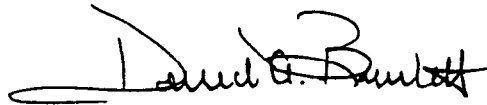
MEMORANDUM FOR

Commanders, CONUSA/Major Subordinate Commands  
Commanders, FORSCOM Installations  
Commander, Third United States Army  
Chiefs, Primary and Secondary Staff Agencies, Headquarters U.S.  
Army Forces Command

SUBJECT: Processing of Proposed Waivers to Regulatory and Legal  
Barriers

1. This memorandum provides guidance on the revised methods for processing waivers to regulatory or legal barriers to achieve greater efficiency in FORSCOM operations. Of special interest are the changes to expedite test waivers to Army Regulations (AR), Defense Federal Acquisition Regulation Supplement (DFARS), and Federal Acquisition Regulation (FAR). Specific instructions are provided at the enclosure.
2. Forces Command remains the Department of Defense leader in eliminating red tape by waiving or obtaining waivers to regulatory and legal barriers. However, we need to do even more. With this in mind, I charge you to make substantial changes in the way we do business and to help me disseminate those success stories. The key is to be innovative - to try many ideas, keep what works, discard what does not, and provide our entire community with the results, whether positive or negative.
3. While our immediate goal is to maximize efficiencies, our continuing objective is mission readiness. Now more than ever, readiness depends on doing business smarter.

Encl

  
DAVID A. BRAMLETT  
General, USA  
Commanding

ENCL 7

## WAIVER PROCESSING STANDARD OPERATING PROCEDURE

### 1. References:

- a. Memorandum, Secretary of the Army, 14 Aug 95, subject: Revised Waiver Authority for Army Reinvention Centers and Laboratories.
- b. Memorandum, Director, Defense Procurement, DP (DAR), 9 Dec 93, subject: Reinvention Laboratories.
- c. Memorandum, HQ Forces Command, AFCG, 28 Aug 95, subject: DOD Waiver Authority for Army Reinvention Centers and laboratories.

2. General Instructions. The FORSCOM Intranet will be used to identify a waiver to a FORSCOM regulation; request permission to conduct a test for waiver of an Army Regulation, Defense Federal Acquisition Regulation Supplement, or Federal Acquisition Regulation; forward a request to waive a Department of Defense regulation or other agency regulation; or request a change to a public law. The Installation Commander is the only individual who can authorize these actions. Two people per installation will be given authority to write to the FORSCOM Intranet--use of Windows 95 Internet Explorer is required. The FORSCOM Intranet home page (address: <http://freddie-forscom.army.mil:2010/>) provides specific instructions. This methodology allows our entire community to observe and comment on the test. The Intranet or e-mail to the Reinvent mail box (address: [reinvent@ftmcphsn-emhl.army.mil](mailto:reinvent@ftmcphsn-emhl.army.mil)) may be used to propose a non-test waiver.

3. Waiving FORSCOM Regulations. Installation Commanders have been granted the authority to waive FORSCOM regulations in accordance with the FORSCOM Reengineering OPORD (Jan 95), page 2, paragraph 2d which states: "...commanders can waive FORSCOM regulations, but must inform the FORSCOM Chief of Staff of these waivers...". This guidance is supplemented as follows:

- a. The Installation Commander will approve all waivers to FORSCOM regulations.
- b. The waiver must specify the barrier being waived, benefits to the Command, and include a detailed legal opinion signed by the SJA. The legal opinion will address whether the action or request is

within the scope of the Command's authorities. The analysis will identify whether the regulatory provision in question is required by statute or higher executive branch promulgation and, if so, will identify the applicable statute/promulgation. A signed copy by the senior legal officer will be locally maintained.

c. The Intranet is the preferred method for submission to HQ FORSCOM, but e-mail to the Reinvent mail box (address: reinvent@ftmcpnsn-emhl.army.mil) is also acceptable.

#### 4. Proposing Test Waivers to ARs/Policies.

a. General. No test is to be started without prior approval of the HQ FORSCOM Chief of Staff. Additionally, before forwarding the proposed test for HQ FORSCOM disposition, the Installation Commander must approve the initiative; this authority cannot be delegated. Installations proposing waivers to Army regulations must be prepared to test the waiver. The steps in paragraph 4b below must also be adhered to before HQ FORSCOM will consider the proposal to test a waiver of an AR.

b. Specific instructions for requesting approval to test a waiver to an AR are provided at the FORSCOM Intranet home page (address: <http://freddie-forscom.army.mil:2010/>). At a minimum, the following must be completed:

(1) Title. Provide a short, descriptive title of the initiative.

(2) Current Process. Briefly describe the current process. If available, provide process mapping diagrams (this is optional). List all regulatory barriers by specifying the actual paragraphs within the regulations that govern the process. Of critical importance is the in-depth legal which must be personally signed by the installation senior legal officer (normally the SJA). The legal opinion will address whether the action or request is within the scope of the FORSCOM Commanding General's authority to waive Department of Army regulations/instructions. It will also identify whether the regulatory provision in question is required by statute or higher executive branch promulgation and, if so, will identify the applicable statute/promulgation. If the action involves waiving a DOD Directive or Instruction (either directly

or because the Army Regulation in question merely restates a requirement from a DOD Directive or Instruction), the analysis will address whether the DOD Directive or Instruction is or is not within the scope of the Secretary of the Army's delegated waiver authority. Though the signed copy will be maintained locally, an electronic copy of the servicing SJA analysis will be submitted to HQ FORSCOM with the request.

(3) Proposed Process. Provide a brief description of the proposed process. Include potential benefits, proposed measures of effectiveness that will be collected to document test results, and a proposed timeline for conducting the test.

c. While the Secretary of the Army has delegated to the CG, FORSCOM, the authority to waive Department of Army Regulations and Instructions, the following prohibitions apply:

(1) Regulations/instructions (and policies) that address adverse action against or rights and benefits of soldiers and/or civilian employees (including NAF employees) may not be waived.

(2) Regulations, instructions, and policies which address equal opportunity and equal employment opportunity may not be waived.

(3) Provisions of regulations/instructions that merely restate requirements imposed by statute, executive order, executive branch-wide regulations, such as those of the OMB, or DOD Directives or Instructions may not be waived.

(4) Provisions of a regulation/instruction that have the status of a "legislative regulation or issuance" may not be waived.

(5) Provisions required by law may not be waived.

(6) The waiver authority may not be used so as to augment, without further action by HQDA, resources such as manpower, facilities, money, or equipment provided to FORSCOM and its subordinate units/installations.

(7) Testing waivers to unit/individual readiness and unit movements is prohibited. Requests for waiver of unit/individual readiness or unit movements must be forwarded to HQ FORSCOM for disposition.

d. HQ FORSCOM Deputy Chief of Staff for Resources and Evaluation (DCSRE) is responsible for ensuring the submission is complete.

(1) To ensure that the proposal is complete and that all regulatory barriers have been identified, DCSRE will forward the initiative to the HQ FORSCOM functional proponent to validate the barrier(s) listed and then forward to HQ FORSCOM SJA for review. The staff will provide a recommended disposition with justification to DCSRE for presentation to the HQ FORSCOM Chief of Staff. The disposition will normally be provided to installations within fifteen working days from receipt on the Intranet and will include one of the following: sanction a test, forward to HQDA for wider implementation, waive across the Command without testing, or disapprove the test. The HQ FORSCOM Chief of Staff may grant an extension to the functional proponent or the SJA for purposes of additional research into a complex issue or writing an opinion. In the case of an extension, the installation will be immediately notified.

(2) If the proposal is incomplete, it will be returned via the Intranet to the contributing installation for additional information.

(3) Upon approval, information regarding the test will be placed on the Intranet to allow the entire community an opportunity to review and comment. However, no other installation except the contributor is sanctioned to conduct a test.

e. As required by reference 1a, HQ FORSCOM must inform HQDA that a waiver is being tested.

f. Upon completion of the test, the installation will submit the test results and a recommendation, the impact on the measures of effectiveness, and other pertinent data to HQ FORSCOM.

g. Final waiver authority remains with the FORSCOM Commander.

5. Proposing Tests to Waive Defense Federal Acquisition Regulation Supplement (DFARS) and Federal Acquisition Regulations (FARS). DFARS and FARS are the only other regulations that can be waived by the FORSCOM Commander and, as such, are the only other regulations that can be proposed for testing. No test is to be started without prior approval of the HQ FORSCOM Chief of Staff. The Installation Commander must also approve all proposals to test; this authority can not be delegated. Additionally, installations proposing waivers to DFARS and FARS must be prepared to test the waiver. Installations must adhere to the following steps before HQ FORSCOM will consider the proposal to test a waiver of the DFARS or FARS:

a. The test waiver parameters are identical to those outlined in paragraph 4 above.

b. In accordance with reference 1b, testing of the following is prohibited:

(1) Deviations that have significant effect beyond the internal operating procedures of the agency or those that have a significant cost or administrative impact on contractors or offerors.

(2) Deviations that are identified in DFARS 201.402(1)(i) (Procurement Integrity, Rights in Data and Copyrights; Applicability of Cost Principles; Contracts with Commercial Organizations; or Contract Financing).

(3) Requirements imposed by statute or those that implement the regulations or directives of other agencies (e.g., Small Business Administration, Department of Labor).

6. Proposed Change To Other Regulatory Barriers. Authority has not been granted to this Command to waive non-DFARS DOD regulations, policies, directives, issuances, and procedures. Further, the Command does not have the authority to change regulations of the Office of Personnel Management, Office of Management and Budget, or other Federal agencies. Guidance on requesting these waivers is as follows:

a. The same data required in paragraph 4b needs to be submitted in proposing changes to barriers that are outside the HQ FORSCOM Commanding General's authority to waive.

b. As with all waiver proposals, the Installation Commander must approve the request to obtain a waiver.

c. Proposed waivers will be placed on the FORSCOM Intranet or forwarded to DCSRE by e-mail to the Reinvent mail box (address: reinvent@ftmcphsn-emhl.army.mil).

d. HQ FORSCOM DCSRE will ensure that the submission is complete.

(1) If the proposal is incomplete, DCSRE will return it to the contributing installation for additional information.

(2) If the proposal is complete, DCSRE will forward the initiative to the HQ FORSCOM functional proponent, SJA, and other staff, as appropriate. The HQ FORSCOM staff will complete the following:

(a) Issue Statement.

(b) Specific Action Requested.

(c) Originator of the Issue.

(d) Relationship to the Command's Strategic Business Plan and the Installation Strategic Business Plan.

(e) Pros and Cons.

(f) Barriers/Inhibitors (laws, regulations, policies, culture, etc.).

(g) Risks (long-term to Army or FORSCOM).

(h) Staff Recommendation. Provide a coordinated recommendation with justification to DCSRE for presentation to the HQ FORSCOM Chief of Staff. Disposition will include one of the following: obtain a waiver to test at selected sites, seek a waiver to implement the change across the Command, or disapprove.

(3) DCSRE will provide the HQ FORSCOM response to the contributor and keep the rest of the Command and HQDA informed. The HQ FORSCOM staff will develop any required functional memorandum and supporting data to be forwarded to HQDA.

#### 7. Proposed Change To Public Law.

a. General. As with all waiver proposals, the Installation Commander must approve the proposal.

(1) Proposed changes to public laws or proposals for new legislation are outside the HQ FORSCOM Commanding General's authority to waive. Requests for legislation are appropriate when the provisions of existing statutes, or the absence of a statute providing authority, preclude or unnecessarily hinder adoption of the most efficient and effective organization and practices at FORSCOM installations. Requests for legislation are not appropriate when the desired outcome can be obtained through waiver, rescission, change, or promulgation of Executive Branch regulations at any level. The Executive Branch has, at times, limited the exercise of its authority as a result of language contained in reports accompanying previously enacted legislation. If the "report language" is an impediment to reengineering, a request for legislation may be appropriate, even if technically not required as a matter of law.

(2) There are basically two types of requests for legislation:

(a) Requests for modification or repeal of laws that impede desired practices and/or organizations (removing roadblocks); and

(b) Requests for enactment of a law to allow desired practices and/or organizations not authorized under existing law (granting new authority).

(3) Both types of requests can result in dramatic change. The second is more challenging to formulate, more conducive to truly breaking paradigms and getting out of the "box" of existing practices, and more valuable in the long run. Legislative requests of the second type also facilitate a true partnership approach between the Executive Branch and Congress within the framework of the



National Performance Review and the Defense Performance Review. Accordingly, while both types of requests will be necessary, the main focus of creative thought should be on positive, empowering enactments granting broad new authority.

(4) The Office of Management and Budget (OMB) is responsible for the overall Executive Branch legislative program. Its role is to coordinate legislative proposals among interested agencies, ensure that proposals are consistent with the overall program of the Administration, and coordinate Executive Branch positions on legislative proposals originating in Congress. The Office of the DOD General Counsel, in conjunction with the Assistant Secretary of Defense (Legislative Affairs) and the DOD Comptroller, has parallel responsibilities at the OSD level. With responsibility for the overall Army legislative program, the Office of the Chief of Legislative Liaison (OCLL) coordinates proposals with the Army General Counsel, Office of the Judge Advocate General (OTJAG), functional proponents in the DA Secretariat and on the Army Staff and, as a result of the Reinvention Center designation, the CG FORSCOM. As an exception to OCLL's overall responsibilities, the Assistant Secretary of the Army (Financial Management) is principally responsible for submissions considered as part of the Appropriation Act cycle, and the Assistant Secretary of the Army (Civil Works) is principally responsible for legislation relating to the civil works functions of the Corps of Engineers.

(5) There are four basic recurring HQDA programs for the submission of requests for legislation. These are:

(a) Legislation submitted as part of the annual Authorization Act cycle;

(b) Legislation submitted throughout the year as so-called "free standing" legislative proposals;

(c) Legislation submitted as part of the DOD "Omnibus Legislative Package" (usually merged by Congress with Authorization Act requests and considered as a single package); and

(d) Legislation (as distinct from funding levels) submitted as part of the annual Appropriation Act cycle. Appropriation legislation normally involves only authority to expend funds on otherwise authorized activities. Permanent legislation is

not enacted in the Appropriation Act, although some provisions (normally prohibitions or restrictions on expending funds) tend to be reenacted each year (so-called "recurring provisions").

b. Format for submission of requests for legislation.

(1) Proposed changes to public law or new legislation will be placed on the FORSCOM Intranet or forwarded to DCSRE by e-mail to the Reinvent mail box (address: reinvent@ftmcphsn-emhl.army.mil).

(2) The following format will be used:

(a) SUBJECT: Request for Legislation

(b) SUBMITTED BY: (Specify the requesting command.)

(c) ACTION REQUESTED: (Brief statement of specific desired outcome. Avoid nonspecific requests.)

(d) NEED FOR LEGISLATION: (A brief narrative statement explaining why the legislation is needed. State what this will allow that cannot currently be done or what the installation will stop performing that is currently required. This statement will provide the basis for the formal statement submitted to Congress along with the proposal. It needs to be succinct, persuasive, and avoid jargon or acronyms. The statement should clearly express intended outcome.)

(e) ROLE IN COMMAND STRATEGIC BUSINESS PLAN AND THE INSTALLATION STRATEGIC BUSINESS PLAN: (A brief statement explaining how the requested legislation fits within the Command and installation Strategic Business Plans. If the requested legislation is relevant to an existing action being worked by HQ FORSCOM, specify the reengineering issue.)

(f) RELEVANT PROVISIONS OF EXISTING LAW: (If the request involves repealing or amending existing law, the specific provisions needs to be identified. Use the codified citation for codified provisions, and the public law citation for uncoded provisions.)

(g) POINT OF CONTACT: (Give the name, position, e-mail address, phone, and fax numbers of the individual who can provide additional detailed information about the request.)